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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/712,131

11/13/2003

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104035.271436

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7055 7590 06/17/2010
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EXAMINER

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ART UNIT

PAPER NUMBER

3782

NOTIFICATION DATE

DELIVERY MODE

06/17/2010

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANDREAS SCHABERT and GUNTHER SCHULTZ

Appeal 2009-003394
Application 10/712,131
Technology Center 3700

Decided: June 15, 2010

Before LINDA E. HORNER, JENNIFER D. BAHR, and KEN B.
BARRETT, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Andreas Schabert and Gunther Schultz (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 12-14, 16-18, 22-26, and 28-31. Claims 1-11, 15, 19, and 27 have been canceled. Claims 20, 21,

32, and 33 have been withdrawn. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

THE INVENTION

Appellants' claimed invention pertains to a relockable folding box. Spec. 1. Claim 12, reproduced below, is representative of the subject matter on appeal.

12. A relockable, rectangular-shaped folding box comprising:

- a first side panel having a perforated zone formed therein;

- a second side panel opposing said first side panel;

- a pair of opposing lateral side panels connecting said first side panel to said second side panel;

- a bottom closure comprising two bottom closing flaps and two bottom dust flaps;

- a top closure comprising at least one top closing flap and two top dust flaps;

- an insertion tab hinged to one of said lateral side panels and fixedly attached to the perforated zone formed in said first side panel such that upon removal of the perforated zone, the insertion tab remains fixedly attached to the perforated zone and said box is relockable by insertion of said insertion tab into said box; and

- a two-layer hanger comprising a first hanging tab comprising an aperture and a second hanging tab comprising an aperture, wherein said first and second hanging tabs are hinged to a top of either said first side panel or said second side panel and operatively positioned for pressing together such that the apertures of the hanging tabs substantially coincide to form the two-layer hanger.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Davidson	US 2,038,893	Apr. 28, 1936
Dixon	US 4,949,845	Aug. 21, 1990
Schultz	US 6,279,819 B1	Aug. 28, 2001
Barthel et al.	DE 44 23 468 A1	Jan. 4, 1996
Ghavami	DE 100 15 053 A1	Sept. 27, 2001

The following Examiner's rejections are before us for review:

- A. Claims 12-14, 16, 17, 22, 25, and 26 are rejected under 35 U.S.C. § 102(b) as being anticipated by Dixon;
- B. Claims 12, 16, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barthel and Ghavami;
- C. Claims 12, 13, 16, 22, and 25 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Davidson and Ghavami;
- D. Claims 17, 18, 23, 24, and 28-31 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barthel, Ghavami, and Schultz, or over Davidson, Ghavami, and Schultz; and
- E. Claim 18 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Dixon.

ISSUES

Regarding the anticipation rejection, Appellants contend that the Examiner has failed to show that Dixon discloses the hanger hinged to the top of either a first or second side panel as recited in independent claims 12 and 22. App. Br. 9. Thus, the first issue is whether the Examiner failed to show that Dixon discloses the hanger hinged to the top of the first or second side panel.

As to the obviousness rejections premised on modifying the Barthel and Davidson boxes, Appellants contend that the Examiner's interpretations of the primary references are inconsistent with the box orientations shown in the references' figures. *E.g.*, App. Br. 13-14, 18-19, 24-25. Based on this contention, Appellants argue that there is no reason to modify the primary references and that there is no suggestion to place the hanger on any particular portion of each respective box. *E.g.*, *id.* at 13, 14. Thus, the issues include whether the Examiner erroneously interpreted Barthel and Davidson, whether there is a rational reason to modify the references, and whether there is a suggestion to place the hanger on a particular portion of the modified boxes.

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence.

1. Appellants identify Figure 3 of the Specification as an embodiment of the invention of claim 12. App. Br. 3-4. Figure 3 is reproduced below:

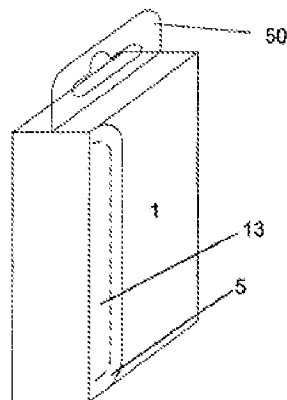


Figure 3 depicts a “glued-together folding box with a hanger put upright.” Spec. 8.

2. Ghavami discloses a reclosable (relockable), side opening, foldable box with a hanger at the top. *See, e.g.*, Ghavami, figs. 1, 3. Figure 3 of Ghavami is reproduced below:

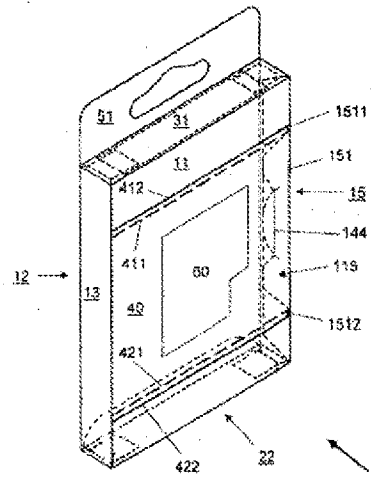


Figure 3 depicts “a frontal view of the completely finished and closed foldable box.” *Id.* at 18. After Ghavami’s box is initially opened, the box is reclosed by inserting a portion of flap 15 into incision 144. *Id.* at 13-14. Closing tab 31 is pivotally attached to the top of the panel (front wall 11) opposite the panel (rear wall 12) to which the hanging flap 51 is attached. *See id.* at 10-11; fig. 1.

3. Schultz discloses a blank for a folding box having a rear side wall 12 (corresponding to Appellants’ first side panel) with a weakened or predetermined tearing line 41 (defining a perforated zone) and a front side wall 11 (a second side panel). Schultz, col. 6, ll. 33-41; fig. 1. Top closure 30 is joined to the rear side wall 12. *Id.* A first hanging tab 312 is joined to the top of the front side wall 11 via tab 311, and a second hanging tab 313 is pivotally joined to the first hanging tab 312. *Id.*, col. 7, ll. 19-24; figs. 1-3.

ANALYSIS

A. *Claims 12-14, 16, 17, 22, 25, and 26 are rejected under 35 U.S.C. § 102(b) as being anticipated by Dixon*

We agree with Appellants' assertion (App. Br. 9) that the Examiner has failed to show that Dixon discloses the hanger hinged to the top of either the first or second side panel as recited in independent claims 12 and 22.

The Examiner found that one of Dixon's end walls 12, 14 corresponds to Appellants' top closure. *See* Ans. 4 (identifying the bottom closure as comprising either flaps 26, 30, 34, 38 or flaps 24, 28, 32, 36, and the top closure formed by the flaps opposing the bottom closure); Dixon, col. 3, l. 10; figs. 1-3 (showing those identified elements comprising end walls 12 and 14). Thus, the Examiner has, in effect, found that Dixon discloses Appellants' box rotated ninety degrees. *See* Ans. 8-9. The Examiner further found that Dixon's elements 42, 44 comprise the hanging tabs, and that those components are hinged to the top of a side panel *when the orientation is changed* such that panels 12 and 14 are the box sides rather than the top and bottom. *See* Ans. 4. The Examiner's findings are internally inconsistent as to what constitutes the top of Dixon's box. As such, we cannot sustain the anticipation rejection of independent claims 12 and 22, and their respective dependent claims 13-14, 16, 17, 25, and 26.

B. *Claims 12, 16, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barthel and Ghavami*

Claim 12 recites a relockable box that opens on a lateral side and has a hanger on the top. The box is relockable in that the insertion tab may be tucked into the box.

Similar to the preceding rejection, the Examiner, in effect, found that Barthel discloses Appellants' claimed box, sans hanger, rotated ninety degrees. *See* Ans. 5 (finding that Barthel's top part 7 (which includes top flap 19 (Barthel at 7; figs. 1, 3)) corresponds to Appellants' lateral side panel); Ans. 9 (finding that the boxes are capable of being oriented upwardly). The Examiner found that Ghavami teaches that it was known to make a side opening box with a two layer hanger, and concluded that it would have been obvious to apply this teaching to Barthel's box to facilitate hanging a side opening box for display. Ans. 5; *compare* Fact 1 (Appellants' box) *with* Fact 2 (Ghavami's box). Ghavami's box has the hanger located at the top (relative to the side opening). *See* Fact 2. Thus, the combined references' teachings suggest Appellants' side opening box with a tucking insertion tab and a hanger on the top, and the Examiner has set forth a rational reason to support the conclusion of obviousness. As such, we are not persuaded by Appellants' arguments to the contrary, App. Br. 14, 15 (arguing that there is no reason to modify the references and that there is no suggestion to place the hanger on any particular portion of the box).

Appellants argue that the rejection is in error because Barthel's figures depict the panels found to be lateral sides as the top and bottom of Barthel's box. App. Br. 13-14. However, Appellants' argument is based on labels, not structural distinctions. Appellants offer no persuasive argument or evidence that one of ordinary skill would fail to recognize that Barthel's box could be rotated such that the lateral side becomes the box bottom. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007) ("A person of ordinary skill is also a person of ordinary creativity, not an automaton.").

Appellants' assertion, App. Br. 14, that the Examiner failed to identify in the Final Rejection the panel of Barthel's box that corresponds to Appellants' bottom closure does not persuade us of reversible error. Appellants clearly understood the Examiner's interpretation of Barthel and recognized that the rejection is based on rotating Barthel's box. *See id.* at 13-14. Further, the Examiner amplified the findings in the Answer. Ans. 5 (identifying the panels found to be the top, bottom, lateral sides, etc).

Appellants' assertion that Ghavami fails to disclose hinging the insertion tab to a lateral side panel is misplaced as the Examiner's rejection is based on the combination of references, and the Examiner found that feature in Barthel, Ans. 5. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) ("Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.").

For the foregoing reasons, we sustain the Examiner's rejection of claim 12 as obvious over Barthel and Ghavami. Appellants present arguments regarding claim 22 under a separate heading. App. Br. 15-17. However, those arguments appear to be the same unpersuasive arguments presented for claim 12. Therefore, we also affirm the rejection of claim 22 as obvious over Barthel and Ghavami.

Claim 16 depends from claim 12. Appellants do not offer separate arguments for this claim, and therefore it falls with its parent independent claim.

C. Claims 12, 13, 16, 22, and 25 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Davidson and Ghavami

Like the previous rejection, the Examiner found that Davidson discloses Appellants' claimed box (without the hanger) lying on its side, and proposes modifying Davidson's box as taught by Ghavami in the same manner discussed above. *See* Ans. 6 (referring to elements shown in Davidson, fig. 11); *id.* at 9. Appellants again repeat the arguments made in the context of the rejection based on Barthel and Ghavami. *See* App. Br. 18-22. For the reasons discussed above, we are not persuaded by Appellants' arguments, which are primarily rooted in the belief that one of ordinary skill would not recognize that Davidson's box may be re-oriented as suggested by Ghavami. As such, we sustain the rejection of claims 12, 13, 16, 22, and 25 as obvious over Davidson and Ghavami.

D. Claims 17, 18, 23, 24, and 28-31 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barthel, Ghavami, and Schulz, or over Davidson, Ghavami, and Schultz

As to this rejection, Appellants only offer arguments regarding independent claim 28. App. Br. 23-26. Appellants assert that the remaining claims, which are all dependent claims but do not all depend from claim 28, stand or fall with the claims from which they depend. *Id.* at 26. As we sustain the rejection of the respective parent claims for the reasons given above, we also sustain the rejection of claims 17 and 18 (depending from claims 12 and 16) and claims 23 and 24 (depending from claim 22). We now turn to claim 28 and its dependent claims 29-31.

Claim 28 recites a blank for Appellants' relockable, side-opening box with a top closing flap pivotally joined to the top of the first side panel, a

first hanging tab pivotally joined to the top of said second side panel (i.e., of the front or back panel, the one without the perforated zone) and a second hanging tab joined to the first hanging tab. The Examiner finds that Schultz discloses the recited hanging tab location, and proposes applying that teaching to the combinations of references from the previous two rejections. Ans. 7. The Examiner maintains that hinging the hanging tab on the second panel is merely the reverse of the position in the previous proposed combinations, and is an obvious and arbitrary change suggested by the prior art, namely Schultz. *Id.*

Appellants once again repeat the unpersuasive arguments directed at the underlying combination of either Barthel and Ghavami or Davidson and Ghavami. App. Br. 23-25. Additionally, Appellants argue that there is no suggestion in the cited references to place Schultz's hanger and closure flap on any particular portion of either of the primary references. App. Br. 25-26. As discussed above, Ghavami teaches locating the hanging tab on the top of a side-opening box. *See* Fact 2. Schultz discloses a foldable box with a perforated zone on the rear side wall and a two part hanging tab joined to the top of a front side wall (corresponding to Appellants' second side panel). Fact 3. Both Ghavami and Schultz disclose a top closing tab joined to the panel opposite the one having the hanging tabs. Facts 2, 3. Thus, contrary to Appellants' assertion (App. Br. 25-26), Schultz does suggest placing the hanger and closure flap at a particular portion of the Davidson and Barthel boxes as modified in light of Ghavami's teaching of a side opening, hanging box.

Lastly, we are not persuaded by Appellants' argument that Schultz does not teach hinging an insertion tab to a lateral side panel. App. Br. 26.

The rejection is based on a combination of references, and this feature was found in the primary references. Ans. 5, 6.

We are not persuaded of error in the Examiner's conclusion of obviousness of claim 28 over Barthel, Ghavami, and Schultz, or over Davidson, Ghavami, and Schultz. Dependent claims 29-31 fall with independent claim 28.

E. Claim 18 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Dixon

Claim 18 depends indirectly from independent claim 12. For the reasons set forth above, we do not sustain the rejection of claim 12 as anticipated by Dixon. The Examiner does not articulate an obviousness rejection of claim 18 that cures the deficiency of the underlying rejection of claim 12. *See* Ans. 5. As such, we also cannot sustain the rejection of claim 18.

CONCLUSIONS

The Examiner has failed to show that Dixon discloses the hanger hinged to the top of the first or second side panel.

The Examiner has not erroneously interpreted Barthel and Davidson, there is a rational reason to modify the references, and there is a suggestion to place the hanger on a particular portion of the modified boxes.

DECISION

The decision of the Examiner to reject claims 14 and 26 is reversed. The decision of the Examiner to reject claims 12, 13, 16-18, 22-25, and 28-31 is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

mls

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